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CONCORD, N.H.

Mr. Stanton C. Otis, Right-of-Way Engineer
Department of Public Works and Highways
State House Annex
Concord, New Hampshire

Dear Mr. Otis:

Under date of May 29, 1956 you have advised that recently, before the completion of the assessment of one section of the Central New Hampshire Turnpike, a member of the commission became seriously ill and passed away prior to the filing of the return. The return was filed, signed by the other two members. You have asked this office's opinion relative to the legality of the return.

While it is true that Revised Statutes Annotated 21:15 declares "Words purporting to give a joint authority to three or more public officers shall give such authority to a majority of them, unless otherwise expressly declared," when there is not a full board, the statute confers no additional authority upon those in office to act until the vacancy or vacancies be filled. Palmer v. Conway, 22 N.H. 144; Wentworth v. Farmington, 49 N.H. 119.

This latter case - still authority in this State - considered this problem at length and the Court said, (page 122)

"It is true, that nothing remained to be done but to reduce to writing, and make report of what they had already done and decided; and yet until such report was actually made, the commissioners were at full liberty to modify, or reverse, entirely the decisions they had made. If nothing remained to be done, but some merely ministerial act, then the case might be different; but as it is, we feel obliged, somewhat reluctantly, to hold that the duties remaining to be performed, were substantial in

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their character, and could not be performed by the two remaining commissioners. . . ."

and again, on page 124 of said case:

"It is best, we think, that it be understood that the business must be fully completed, while the board of commissioners is full. That rule, has the advantage of simplicity, and if observed, will avoid much uncertainty and inconvenience."

This is an anomalous situation because under the doctrine of Hall v. Manchester, 39 N.H. 295, and the authority of the statute quoted, so long as all members of the Commission are alive, the majority of the Commission may act. The instant one of the Commission dies, however, their action is frozen until the successor commissioner has been appointed to fill the vacancy so that the full board may act.

Accordingly, it is this office's opinion that the return filed by two commissioners after the decease of the third commissioner is of no force and effect and that it is necessary for the Governor and Council to appoint a third commissioner to fill the vacancy and to instruct the commission to complete the work of the layout.

This means that not only must a new return be effected, but any proceedings taken after the death of the third commissioner, including even such action in review as the Governor and Council may have undertaken in that period after the commissioner's death, must be redone to the end that all proceedings and documents shall be in order as acts of the full Commission.

Very truly yours,

George F. Nelson
Assistant Attorney General

GFW:W